119 (1)

No. ———

# In The
# Supreme Court of the United States

ROGER M. ESTILL, *et al.*,
*Petitioners,*

v.

GEORGIANNA COOL, *et al.*,
*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether this Court's *Anderson / Burdick* framework permits ballot access to be conditioned on a severe/incidental dichotomy that applies traditional rational basis review to every election law imposing a less than severe burden on the rights of candidates and voters?

## RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

*Plaintiffs-Appellants and Petitioners:* Roger M. Estill and Denise A. Estill, individually.

*Defendants-Appellees and Respondents:* Georgianna Cool, Lucille L. Hastings, Wesley J. Schmucker, and Ann Stotler, in their official capacity as members of the Holmes County, Ohio, Board of Elections; Jennifer L. Brunner, in her official capacity as Secretary of the State of Ohio.

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## PETITION FOR A WRIT OF CERTIORARI

Roger M. Estill and Denise A. Estill respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated November 4, 2008, is unofficially reported at 2008 WL 4790142, and is reproduced at App. A, 1a-7a.

The Opinion and Order of the U.S. District Court for the Southern District of Ohio, Eastern Division, dated October 9, 2008, is unofficially reported at 2008 WL 4560768, and is reproduced at App. B, 8a-27a.

## JURISDICTION

The judgment of the U.S. Court of Appeals sought to be reviewed was entered on November 4, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The relevant statutory provision involved is Ohio Revised Code § 311.01, which is reproduced at App. C, 28a-34a.

## STATEMENT OF THE CASE

This action arises from a decision of a county board of elections to exclude Petitioner Roger M. Estill[1] from appearing on the November 2008 general election ballot as a candidate for the office of sheriff of Holmes County, Ohio. App. 1a-2a.

In addition to imposing various other requirements, Ohio law provides that "no person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless ... [t]he person ... has been employed ... as a full-time peace officer ... [or] ... as a full-time law enforcement officer" within and for specified periods of time. Ohio Rev. Code § 311.01(B)(8)(a) and (b). In promulgating this requirement, the Ohio General Assembly chose not to define § 311.01's use of the term "full-time" specifically within the legislative code as it has done elsewhere for other purposes. App. 18a. The Secretary of the State of Ohio, who is charged with the authority to direct and advise the county boards of elections with respect to the conduct of elections, has advised that "full-time" means employment full-time "for at least one day." App. 13a, 15a. The Advisory leaves it up to each of Ohio's eighty-eight (88) county board of elections to determine the meaning of "full-time" under Ohio Rev. Code § 311.01, but not the length of time, *i.e.*, one day. App. 15a.

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[1] Petitioner Denise A. Estill is a resident of Holmes County, Ohio, and qualified elector who supported the candidacy of Roger M. Estill and intended to vote for him at the general election. App. 13a.

Although Petitioner often worked in excess of eight (8) hours per day during the qualification period, and more than forty (40) hours per week, the county board of elections rejected his candidacy solely because the "Notice of Peace Officer Appointment/Termination" filed by his employer, the Millersburg Police Department, with the Ohio Attorney General had a box checked indicating that his employment status was "part-time." *See* App. 14a. Petitioner was and still is employed as a Sergeant by the Millersburg Police Department.

Petitioners brought this action challenging the constitutionality of the full-time requirement as applied by the state and seeking injunctive relief placing Petitioner's name on the ballot. App. 2a. The District Court determined that the statute was constitutional and denied the request for injunctive relief. App. 3a. The Sixth Circuit determined that "[Ohio Rev. Code § 311.01(B)(8) is a 'reasonable, nondiscriminatory restriction' that only incidentally burdens [Petitioners'] rights," applied rational basis review and affirmed. App. 1a-7a.

Roger and Denise Estill respectfully petition this Court for review of the Sixth Circuit's decision applying the *Anderson / Burdick* framework analyzing the burden imposed using a severe/incidental dichotomy to apply traditional rational basis review in every instance where a less than a severe burden is imposed.

## REASONS FOR GRANTING THE PETITION

The Constitution bestows upon the states the power to determine "[t]he Times, Places and Manner

of holding Elections for Senators and Representatives". While a state has a general interest in preserving the sanctity of the ballot box, "[a] State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Eu v. S.F. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989)(quoting *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986); *see also id.* ("[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights ..."). In *Burdick* and *Anderson* this Court prescribed a sliding scale balancing test meant to "examine in a realistic light the extent and nature of [the law's] impact on voters," *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983), requiring the courts to pair the level of scrutiny with the alleged harm. *See also Burdick v. Takushi*, 504 U.S. 428 (1992). "Laws that affect candidates" can indirectly impose countless different types of "theoretical, correlative" burdens upon voters. *See Anderson*, 460 U.S. at 786. The Sixth Circuit's approach looks no further than content neutrality and alternative access, ultimately applying either strict or traditional rational basis scrutiny - thus permitting unfettered discretion in the *application* of election laws so long as the opportunity for discrimination is cloaked by seemingly innocuous statutory language.

To evaluate a law respecting the right to vote – whether it governs voter qualifications, candidate selection, or the voting process – this Court's precedents require use of the approach set out in *Burdick v. Takushi*, 504 U.S. 428 (1992); *Crawford v. Marion County Election Board*, 553 U.S. ___, 128 S.Ct. 1610, 1624 (2008)(SCALIA, J., concurring). In *Burdick*,

this Court explained the proper standard to govern the constitutionality of challenged election laws as follows:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends on the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. [W]hen those rights are subject to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.

*Burdick*, 504 U.S. at 434 (internal quotations and citations omitted).

The Sixth Circuit recognized, "[a]s a threshold issue, we note that the [Petitioners] challenge only how Ohio has interpreted and applied the full-time

requirement, not the requirement of full-time employment per se," (App. 3a.), yet went on to hold that the full-time employment requirement was not content based and provided an alternative means of access because it "imposes only an incidental burden on the [Petitioners'] rights." App. 5a. Therefore, reasoned the court "[Petitioners] bear the heavy burden of negative[ing] every conceivable basis which might support 'the legislation'" App. 5a (citations omitted). While the state failed to advance any interest supported by adding the one day of full-time employment requirement, the court determined that "Ohio could rationally adopt the bright-line rule of employer classification in determining whether candidates have the requisite full-time experience;" apparently holding that the state could permissibly apply the rule, even though it is not the rule the state adopted. App. 5a-6a. By not requiring the state to produce evidence in support of tailoring, it was sufficient that Petitioners "have not demonstrated that the fit between the classification rule and the goal of selecting qualified candidates is so poor that the rule is irrational." App. 6a.

The court also dismissed Petitioners' assertion that it is constitutionally impermissible to deny access to the ballot based on a third-party designation or lack thereof, reasoning that such a designation "like any other potential qualification, may be reasonably relevant to candidates' fitness for office, and that is all the constitution requires." App. 7a. That "states may require that candidates for prosecutor or judge have law degrees, that coroner candidates have medical degrees, or that city engineer candidates have engineering degrees" because they are "rationally related to candidates' qualifications for office" is not

the same as acquiescing in a classification rule that "*likely* identifies candidates with actual full-time experience," meaning that some qualified candidates admittedly slip through. App. 6a (emphasis supplied)("[a]ll bright-line rules, including the classification rule, are under- and over-inclusive"). Applying traditional rational basis scrutiny, the court is able to frame Petitioner's unjustified exclusion from the ballot as a mere "disagreement with the policy choices made by the local boards of election." App. 6a. Not every classification rule is *per se* rational simply because the state can require certain qualifications on candidates for sheriff; even the lesser standards under *Burdick* require some evidence of tailoring. *Cf.* App. 6a. ("[o]ur conclusion that the classification is rational is reinforced by the fact that the rule is merely one of a number of qualifications Ohio imposes on candidates for Sheriff").

The employment full-time requirement is presumably what already serves the "goal of selecting qualified candidates," assuming that the state interest is the one supplied by the Court, the question remains as to what specific interest is served by amplifying the requirement so as to fence out qualified candidates based solely on employer classification - particularly given that the statute does not require the state to do so. Simply put, "saving local boards of election resources that would otherwise be spent investigating particular candidates' actual work history," is not even "rationally related to candidates' qualifications for office." *See* App. 6a.

## I. THE SIXTH CIRCUIT IGNORES THIS COURT'S PRECEDENT REQUIRING A SPECIFIC STATE INTEREST SUPPORTING ANY LIMITATION ON BALLOT ACCESS

Unfortunately, the Sixth Circuit has refashioned this Court's test into a binary severe/slight burden test that rubber stamps any rule whose burden is anything less than severe. The Sixth Circuit's misapplication of *Burdick* can lead to arbitrary results in similar cases, and arbitrariness can look like political favoritism by judges to voters already concerned about the fairness of the electoral process and judicial supervision of it.

The Sixth Circuit claims to rely on its own standard for the application of the *Anderson / Burdick* test set forth in *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998), which considered the effects of a state constitutional amendment imposing lifetime term limits on state legislators. Yet, in *Citizens*, *even though the court determined that the burden was not severe*, it still undertook a broad analysis of the question of severity (at 921-23), the interests advanced by the state in support (at 923-24), and the tailoring of the statute (at 924). Although the court claimed to reject Petitioners arguments based on the same standard, the court's six (6) page Opinion, citing four (4) cases, issued on election day, undertook no such analysis. Rather, the court conceded that it undertook a truncated analysis:

> "[Petitioners] dispute this application of the *Anderson / Burdick* framework in two ways. First, they argue that the severe/incidental burden dichotomy is inadequate for close cases, and they believe that this is such a case.

> Regardless of the merits of this argument, this court's and the Supreme Court's precedent have repeatedly affirmed the severe/incidental dichotomy. *See, e.g., Citizens*, 144 F.3d at 920-21; *Clingman v. Beaver*, 544 U.S. 581, 603 (2005). Second, the [Petitioners] argue that this court need not apply rational basis review to restrictions that impose an incidental burden. Again, this court's precedent dictates otherwise. *See, e.g., Citizens*, 144 F.3d at 921."

The severe/incidental dichotomy is tolerated by this Court's precedent only with respect to the burden prong of the analysis – this either/or analysis applies only to determine whether or not strict scrutiny will be applied; it is not the end of the analysis. Indeed, for scrutiny level purposes, burdens are all that count. That the court found "only an incidental burden" on the rights implicated, does not wholly excuse the state's absolute failure to set forth any "precise interest" to "justif[y] ... the burden imposed by its rule," and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). To the contrary, it is when strict scrutiny will not be applied that the flexibility of the standard is most important. There is no purpose for requiring the courts analyze the "character and magnitude" of the burden if it is no more than a cryptic lexicon for describing whether strict scrutiny or rational basis review applies. In fact, the extent of the burden must be determined so that it can be paired with where on the scale the analysis of the requirement will fall. The Sixth Circuit's rule ignores constitutional claims as to the *mode* the State chooses to implement its interest simply because the interest itself has value.

Necessarily, *Burdick's* sliding scale analysis requires an assessment of the *degree of necessity* for the state's particular course of action.

A state may not burden the right to vote merely by invoking abstract interests, be they legitimate, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. *Crawford*, 128 S.Ct. at 1627 (SOUTER, J., dissenting). Thus, regardless of the interest the state may have in adopting a "full-time" experience requirement for those seeking election to the office of county sheriff as a general matter, that interest in no way necessitates the particular burdens it imposes. The operative question is not what interest the state has in promulgating a "full-time" requirement – an interest which Petitioners have not challenged – the question is what interest the state has in excluding from the election ballot those candidates who meet that full-time requirement through hours worked rather than through employer designation. Thus, the Sixth Circuit's truncated analysis never reaches the problem of which Petitioners complained.

The Sixth Circuit prescribes a litmus paper test for determining the magnitude of the burden – a burden can be severe only if it imposes a content-based requirement or fails to provide an alternative means of access to the political process. *Citizens*, 144 F.3d at 920-21. In other words, unless a law is facially discriminatory or wholly exclusionary it exerts no more than an "incidental" burden and will be examined with traditional rational basis review. *Id.* Under this analysis, the court may do as it did here, neither requiring the state to supply the purpose its

rule is meant to serve nor analyzing the particular impact of the rule in the case before it. *But see Crawford*, 128 S.Ct. at 1627 (SCALIA, J., concurring)(taking exception with the majority's "record-based resolution of these cases.")

Given the legitimacy of the interests on both sides of these cases, *Burdick* avoids pre-set levels of scrutiny in favor of a sliding-scale balancing analysis; the level of scrutiny varies with the *effect* of the regulation at issue. *Crawford*, 128 S.Ct. at 1628 (emphasis supplied). The extent of the burden is relevant both to setting the appropriate level of scrutiny, and to undertaking the analysis once the level of scrutiny has been determined. The extent of the burden first determines whether or not strict scrutiny applies, and is further analyzed to determine whether or not it is outweighed by precise interest advanced by the state in support of imposing it.

Further, even if the state could show particularized interests addressed by the law, the court must still analyze "the extent to which [they] make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434. Scrutiny of state interests "is not to be made in the abstract, by asking whether [the interests] are high significant values; but rather by asking whether the *aspect* of [those interests] addressed by the law at issue is highly significant." *California Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (emphasis in original). Whatever the requirement, the state must pair it with a corresponding interest of greater weight. To be sure, there is no denying the importance of ensuring that candidates for the office of Sheriff are qualified. Nor do Petitioners deny that the State may serve this interest with a "full-time" requirement.

Even assuming the State had raised the interests upon which the lower courts based their decision, these generalities would still need to be parsed down to the precise "aspect[s of claimed interests] addressed by the law at issue." *Id.*

The state legislature duly promulgated a full-time requirement. The Ohio Secretary of State has advised that the requirement can be met in a single-day. Now, the State seeks to add more to the requirement through its application, albeit without articulating any new or greater interest served by doing so. *But see, e.g., Norman v. Reed*, 502 U.S. 279 (1992); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)(both striking rules increasing signature requirements for local office beyond the requirements had been previously determined to be sufficient for seeking statewide office). Experience, in the state's view, is gained not through hours, weeks, or years of service, but only by the employer checking the "full-time" box on the individual's certificate of appointment; despite the fact that the state legislature has never articulated any such limitation. This is precisely why the state should have been required, and was by *Burdick* required, to articulate the precise interests to justify the rule at issue.

There is a Fourteenth Amendment floor – "at the very least [] a State cannot discriminate in an invidious fashion against its citizens." *Bates v. Jones*, 131 F.3d 843, 873 (9th Cir. 1997)(en banc panel), *cert. denied*, 523 U.S. 1021 (1998). While an experience requirement, or even a full-time experience requirement, may not itself be invidious, construing the requirement to mean one thing and only one thing, *i.e.*, full-time employment as determined by the

employer, is invidious because it is irrelevant to the qualifications set forth in the statute. Therefore, even if, *arguendo*, the state had advanced an interest for its full-time experience requirement, and even if, *arguendo*, that interest were rational, it would not justify the specific burdens placed on Petitioners.

The Sixth Circuit's analysis ends upon finding that the imposition of an experience requirement is permissible. The court never reaches Petitioner's question – determining what precise state interest advanced in construing the statutory full-time experience requirement with respect to this Petitioner to mean only full-time experience as categorized by his employer. The problem with the Sixth Circuit's truncated *Burdick* test is that it requires Petitioners to disprove every conceivable justification and the state to advance no justification, thus avoiding "the hard judgments that must be made." *See Buckley v. American Constitutional Law Found. Inc.*, 525 U.S. 182, 192 (1999).

## II. THE SIXTH CIRCUIT IGNORES THIS COURT'S PRECEDENT REQUIRING THAT A SPECIFIC STATE INTEREST SUPPORTING ANY LIMITATION ON BALLOT ACCESS MUST BE TAILORED TO THE BURDEN IT IMPOSES

If this Court meant to consign all non-severe burden cases to traditional rational basis scrutiny, there have been many opportunities to have held so. Rather, since *Storer v. Brown*, 415 U.S. 724 (1974), this Court has continually emphasized that a "flexible" standard of review is applicable in these cases. "The rigorousness of [this Court's inquiry] into the propriety

of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. As *Storer* recognized, there is "no litmus paper test" for resolving these hard cases and "no substitute for the hard judgments that must be made." 415 U.S. at 730.

Particularly for those cases involving something less than a severe burden, *Burdick* clearly contemplates a different species of rational basis review that must consider the question of tailoring in all cases. Even when a burden is not "severe," the court must examine "the extent to which those interests make it necessary to burden the plaintiff's rights," and whether the law has imposed only "reasonable, non-discriminatory" restrictions on First and Fourteenth Amendment rights. *Burdick*, 504 U.S., at 434; *see also id.*, at 438 ("we have repeatedly upheld reasonable politically neutral regulations that have the effect of channeling expressive activity at the polls"); *Anderson*, 460 U.S., at 789 ("[i]n passing judgment, the Court must weigh not only the legitimacy and strength of each of [the state's asserted] interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.").

Whatever the burden, the state must advance some interest to justify it, so that the court can analyze "the extent to which those interests make it necessary to burden plaintiff's rights." In other words, the kind of rational basis review applied in theses cases requires some consideration of the extent to which the rule is

tailored to the interest it serves. To be sure, the requirement that the a state show some tailoring in all cases *is not* a proxy for the application of a strict scrutiny/compelling interest/narrow tailoring test in all election cases. Rather, it *is* true to the unique sliding scale approach set forth by this Court for use in these cases. Indeed, when courts apply the reasonable-tailoring requirement, most challenges to state or local election laws will still fail. *See Storer*, 415 U.S. at 730. That "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under [this Court's] cases" does not permit the Sixth Circuit to circumvent the analysis entirely. *See id.*

For example, in *Clingman v. Beaver*, a political party complained about a rule barring voters from voting in another party's primary election. 544 U.S. at 584-85. Applying *Burdick*, this Court found that the rule "does not severely burden the associational rights of the State's citizenry." *Id.* at 593. Characterizing the burden was the beginning, not the end, of this Court's constitutional analysis. Next, this Court analyzed whether the law was a reasonable means of furthering the asserted state interest. The state asserted a specific purpose its rule, and this Court found the law tailored to achieve that purpose. *See id.* at 594. In addition, the Court analyzed and found the rule tied to a more general state interest in "facilitating the effective operation of a democratic government." *Id.* at 594-95. In other words, that the burden was not severe was not enough to sustain the rule – the state was still required to demonstrate that its requirement was reasonably tailored to the specific state interest it is meant to advance. *See Burdick*, 504 U.S. at 439-40 (finding that a state rule imposed only a "limited

burden" and that the law was "tailored to the state's interest"); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363-64 (1997)(burden imposed by state rule was neither "trivial" nor "severe;" Court analyzed and held the rule tailored to several interests advanced by state); *Storer*, 415 U.S. at 736 (state law tailored to advanced state interest); *Rosario v. Rockefeller*, 410 U.S. 752, 761-62 (1973)(state law was "tied to [the] particularized legitimate purpose" advanced).

In one instance, this Court has departed from the general rule requiring that the state bring forward some evidence or justification for its law, reasoning that "[s]uch a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). "Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Id.* *Munro's* principle is not an outlier, but rather conforms with the *Burdick* sliding scale analysis by paring back the quantum of interest needed to justify a rule that is neither novel nor implausible. *Cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000)("[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised").

*Munro's* analysis in inapplicable herein for at least two reasons. First, the Sixth Circuit's analysis of the burden emanates only from the statutory language itself; ignoring the burden imposed by its *construction* that permits employer-specific and county by county

application. App. 3a ("§311.01(B)(8) imposes only an incidental burden on [Petitioners'] rights, and we apply rational basis review"). Second, even if the *Munro* analysis applies, any assertion that an individual whose single eight hour work day was classified as full-time employment is more experienced or prepared to seek the office of county sheriff than an individual whose single eight hour work day was not classified as full-time is both novel and implausible. Even under *Munro*, such a construction is not "reasonable" and thus "significantly impinge[s] on constitutionally protected rights." *Munro*, 479 U.S. at 195; *see also Crawford*, 128 S.Ct. 1627 (SCALIA, J., concurring)(pointing out that the burden at issue was both "not severe" *and* "eminently reasonable").

Consider, for example, a state law that requires a candidate to file a petition containing twenty-five (25) signatures in order to run for a particular office. The Secretary of State makes petition forms available to prospective candidates that are printed on white paper. Assume further that a candidate files a petition containing the correct language and twenty-five valid signatures on blue paper and the petition is rejected by the Secretary of State because it is not on white paper. The Sixth Circuit's rule permits the candidate be rejected because acquiring white paper requires only a minimal burden; the requirement itself is content neutral and leaves the candidate free to seek another office by filing a petition on white paper. *See Citizens*, 144 F.3d at 921-24.[2] This test ignores that *Burdick*

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[2] Petitioners do not concede that it is appropriate under this Court's precedent to quantify the burden from the point of view of the candidate. While the *Burdick* analysis focus on the impact of

shifts the burden to the state to articulate *some* interest justifying the need to receive candidate petitions only on white paper, *i.e.*, the tailoring requirement. That the state may have a valid interest in requiring candidates to file petitions is not the end of the analysis.

If the burden is only that an individual seeking to become a candidate for the office of county sheriff needs to have previous law enforcement experience, there is some burden but it is not severe. A requirement that an individual seeking to become a candidate for the office of county sheriff needs to have previous law enforcement experience, and that the experience must have been full-time, is more of a burden than the previous condition but still may not be a severe burden. A requirement that an individual seeking to become a candidate for the office of county

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the burden on the voter, the Sixth Circuit's content neutrality/alternative access to the ballot test for quantifying the burden focused on the burden imposed on the candidate by the employer classification requirement. Even if, *arguendo*, the employer classification requirement is incidental with respect to the burden it imposes on candidate Roger Estill, no consideration was given to its impact – in this case excluding the only candidate challenging the incumbent sheriff and rendering the election for that office meaningless. Lumping of voters' interests with the candidate's interest and analyzing only the requirement and not its effect minimizes the very burdens *Burdick* is presumably meant to protect. From the voters' prospective the burden may well be greater, which would not matter under the Sixth Circuit's binary *Citizens* test, but would be significant if the court were to undertake the proper sliding-scale analysis, *i.e.*, the state would need to advance an even greater and more crisply tailored interest that would otherwise be required if the burden were considered only from the candidate's perspective.

sheriff needs to have previous law enforcement experience, and that the experience must have been categorized as full-time employment by the individual's employer as construed by each individual county board of elections, imposes even more of a burden than the previous two conditions. While this Court has "called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation," under the Sixth Circuit's analysis, each of these conditions would receive the same level of review despite the fact that they impose different burdens and thus have different impacts. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). What matters is that the aggregate constitutional costs of the rule – requiring previous employment, full-time, as construed by each individual employer and determined by each individual county board of elections – substantially exceeds its benefit, *i.e.*, ensuring candidates for county sheriff are experienced. Even if a strict scrutiny analysis does not apply to the requirement at issue, this Court's *Burdick* sliding scale framework requires that the most severe of the lesser burdens be justified by a more important state interest. Every burden, no matter how slight, must be paired with a justification of greater weight.

In *American Party*, this Court held unconstitutional the practice of printing the names of ballot-qualified minor parties on in-person but not absentee ballots. *American Party of Texas v. White*, 415 U.S. 767 (1974). Although the Court did not find a "severe" or even "substantial" burden on voting rights, it reflected on the pointlessness of the disparate treatment – "the State offered no justification for the difference in treatment in the District Court, did not brief the issue here, and had little to say in oral argument to justify

the discrimination." *Id.* at 795. While this decision predates *Burdick*, this is precisely the kind of "rational basis-plus" review that *Burdick* seems to endorse, if not require, and this is precisely the kind of case that begs for its invocation.

By directly tethering the extent of the review to the extent of the burden imposed, *Burdick* suggests a spectrum of relevant variation, not a binary divide. Unfortunately, the Sixth Circuit applies a truncated version of the *Burdick* test that centers only on the severity of the burden, applying strict scrutiny only for "severe" burdens and applies the same traditional rational basis review for all others. *See Citizens*, 144 F.3d at 920-21. Yet, for cases involving a less than severe burden, *Burdick* suggests that a finding of unconstitutionality can still be obtained if the rule at issue is "unreasonable," "discriminatory," or inadequately tied to "important" state interests. *See* 504 U.S. at 434 ("reasonable, nondiscriminatory restrictions" will "generally" be justified by "important regulatory interests"). The Sixth Circuit's application of the standard anything-passes rational basis test in every situation forecloses any possibility of success for those who come before the court with anything less than a severe burden and is in direct derogation of this Court's well-established precedent.

*Burdick* commands that an election law which is not reasonably tailored cannot survive a challenge even if the burden is not "severe." The Sixth Circuit's *Citizens* analysis tolerates a complete circumvention of this requirement.

## CONCLUSION

The Sixth Circuit denied Petitioner Roger Estill access to the ballot and the citizens of Holmes County, Ohio, the opportunity to cast a meaningful vote for the office of county sheriff without requiring anything from the state and without undertaking any meaningful analysis. Indeed, the Sixth Circuit's *Citizen's* approach to the *Anderson/Burdick* framework for the analysis of a state election law applies only traditional rational basis review, does not require the state to advance any interest in support of a ballot access limitation, and does not require any evidence of tailoring in every case in which a burden is deemed less than severe. Either the Sixth Circuit misreads this Court's precedents or this Court's precedents leave a gap through which the lower courts can escape without undertaking a meaningful review of these cases. Either way, this case provides an opportunity for this Court to affirm that review under the *Anderson/Burdick* framework clearly requires more than Petitioners were given. By clarifying the principles underpinning *Anderson/Burdick* review, which require the lower courts to undertake a stronger analysis focused on the individual burdens and interests implicated in each case, this Court can do much to ease the judicial micromanagement of the elections process caused by the case by case articulation of its standard, especially given the disagreement within the court regarding whether *Anderson/Burdick* requires a record based resolution of these cases. *See Crawford*, 128 S.Ct. at 1627 (SCALIA, J., concurring) (taking exception with the majority's "record-based resolution of these cases").

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# APPENDIX

## APPENDIX A

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**No. 08-4316**

**[Filed November 4, 2008]**

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| ROGER M. ESTILL, et al., Plaintiffs-Appellants, | ) |
| v. | ) |
| GEORGIANNA COOL, et al., Defendants-Appellees. | ) |

**On Appeal from the United States District Court for the Southern District of Ohio**

**Before: BOGGS, Chief Judge; and MERRITT and GRIFFIN, Circuit Judges.**

**PER CURIAM:** Plaintiff Roger M. Estill filed a nominating petition to be an independent candidate for Sheriff of Holmes County, Ohio, in the November 2008 general election. After his candidacy was contested, the Holmes County Board of Elections determined that

Estill did not have the qualifications to run for Sheriff under Ohio Rev. Code Ann. § 311.01(B)(8) (West 2008) because he had not been employed as a full-time peace or law enforcement officer within specified times preceding the election.[1] Estill and his wife, a registered Holmes County voter who wishes to vote for him, then filed this civil rights action challenging the constitutionality of the full-time employment requirement. They also filed a motion for a preliminary injunction directing that Roger Estill's name be placed on the November 2008 ballot.

On September 11, 2008, the district court denied the motion for a preliminary injunction. The Estills appealed and moved in the district court for an injunction pending appeal. The district court denied that motion on September 19, 2008, and the Estills appealed that as well. On September 29, 2008, this court denied an injunction pending appeal and affirmed the denial of a preliminary injunction.

The district court then held an expedited trial on the merits beginning on October 7, 2008. At trial, the Estills argued that the full-time requirement, as applied by Ohio, is an unconstitutional ballot access restriction, and they sought a permanent injunction ordering that Roger Estill's name be added to the ballot. On October 9, 2008, the district court ruled that § 311.01(B)(8) is constitutional and denied the request

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[1] Section 311.01(B)(8) also requires that a candidate for Sheriff have a valid peace officer certificate of training from one of two Ohio state commissions. Estill does not challenge the certification requirement, and there is no evidence or even an allegation that the certification requirement is being used to improperly influence the makeup of ballots for the office of Sheriff.

for a permanent injunction. The Estills appeal this determination on the merits. Upon examination, this panel unanimously agrees that oral argument is not needed in this case. Fed. R. App. P. 34(a).

We review the district court's factual findings for clear error and its legal conclusions de novo. *Morrison v. Colley*, 467 F.3d 503, 506 (6th Cir. 2006). We agree with the district court's well-reasoned opinion and reject the Estills' challenge to § 311.01(B)(8).

The Estills' ballot access claim is governed by the *Anderson/Burdick* analytical framework, which requires us to "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 920-21 (6th Cir. 1998) (quoting *Anderson v. Celebrezze*, 460 U.S. 780,789 (1983)). We balance these considerations by applying the level of scrutiny appropriate to the burden imposed by the restriction. If the full-time requirement severely burdens the Estills' rights, we apply strict scrutiny; if, instead, § 311.01(B)(8) is a "reasonable, nondiscriminatory restriction" that only incidentally burdens their rights, we apply rational basis review. *See Citizens*, 144 F.3d at 920-21.

As a threshold issue, we note that the Estills challenge only how Ohio has interpreted and applied the full-time requirement, not the requirement of full-time employment per se. Under Ohio law, the local boards of election are responsible for determining whether candidates possess the statutorily required qualifications. The Estills allege, and the state does

not contest, that Ohio's local boards of election have generally adopted a bright-line rule in applying the full-time requirement: the candidate's employer must have classified the candidate as a full-time employee.[2] For the purposes of this appeal, we assume that this classification rule is an accurate statement of Ohio law, and we consider the constitutionality of both the general full-time requirement and the specific requirement that the qualifying position be classified as full-time by the candidate's employer.

To determine the appropriate level of scrutiny, we must first determine the extent to which § 311.01(B)(8) burdens the Estills' First and Fourteenth Amendment rights. A ballot access restriction is a severe burden and merits strict scrutiny unless it is content neutral and allows alternative access to the political process. *See ibid.* As the district court found–and the Estills appear to concede–§ 311.01(B)(8) is a "reasonable, nondiscriminatory restriction" that does not severely burden the Estills' rights. First, full-time employment, no matter how it is measured, is not a content-based requirement: it does not consider "protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender," and it has not been the basis of other "historical bias." *See id.* at 922. Second, the Estills have alternative means of access to

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[2] In their reply brief, the Estills argue for the first time that this is not a valid interpretation of § 311.01(B)(8). Instead, they claim that the provision requires a facts-and-circumstances investigation into whether candidates actually worked full-time according to the common understanding of that term. Even if this argument is meritorious as a matter of Ohio law, the Estills have forfeited it here because they did not make it at trial or in their primary brief.

the political process because Roger Estill can obtain a qualifying full-time position or run for a different office. *See id.* at 922-23. Therefore, § 311.01(B)(8) imposes only an incidental burden on the Estills' rights, and we apply rational basis review.[3] *See id.* at 921.

Under rational basis review, "plaintiffs bear the heavy burden of 'negativ[ing] every conceivable basis which might support [the legislation].'" *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000) (alterations in original) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Given this low level of scrutiny, we generally will uphold "reasonable, nondiscriminatory restrictions" on ballot access because "'the state's important regulatory interests are generally sufficient to justify [them].'" *Citizens*, 144 F.3d at 921 (alteration in original) (quoting *Anderson*, 460 U.S. at 788). This case is no exception.

We hold that there is a rational relationship between Ohio's interest in ensuring qualified Sheriff candidates and the full-time requirement, both generally and as Ohio has applied it. Ohio could

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[3] The Estills dispute this application of the *Anderson/Burdick* framework in two ways. First, they argue that the severe/incidental burden dichotomy is inadequate for close cases, and they believe that this is such a case. Regardless of the merits of this argument, this court's and the Supreme Court's precedent have repeatedly reaffirmed the severe/incidental dichotomy. *See, e.g., Citizens*, 144 F.3d at 920-21; *Clingman v. Beaver*, 544 U.S. 581, 603 (2005). Second, the Estills argue that this court need not apply rational basis review to restrictions that impose an incidental burden. Again, this court's precedent dictates otherwise. *See, e.g., Citizens*, 144 F.3d at 921.

rationally believe that recent full-time experience in law enforcement is either necessary to be an adequate Sheriff or is a sufficiently strong proxy for the necessary skills that full-time experience should be required. Full-time employment suggests a certain degree of experience, training, and commitment beyond what is normally required by part-time employment. Furthermore, Ohio could rationally adopt the bright-line rule of employer classification in determining whether candidates have the requisite full-time experience. The classification rule likely identifies candidates with actual full-time experience with a high degree of accuracy while saving local boards of election resources that would otherwise be spent investigating particular candidates' actual work history. Our conclusion that the classification rule is rational is reinforced by the fact that the rule is merely one of a number of qualifications Ohio imposes on candidates for Sheriff.

The Estills object to this conclusion, arguing that the classification rule is not reasonably tailored to the goal of qualified candidates because the rule may allow some unqualified candidates while excluding some who are qualified. This is merely a disagreement with the policy choices made by the local boards of election. All bright-line rules, including the classification rule, are under- and over-inclusive. Nonetheless, bright-line rules may still be rationally related to the state's goal, and the Estills have not demonstrated that the fit between the classification rule and the goal of selecting qualified candidates is so poor that the rule is irrational.

The Estills also make a broader objection to the classification rule, claiming that it is constitutionally

impermissible to deny access to the ballot based on a third-party designation or lack thereof. This is incorrect. Third-party designations, like any other potential qualification, may be reasonably relevant to candidates' fitness for office, and that is all that the Constitution requires. Thus, for example, states may require that candidates for prosecutor or judge have law degrees, that coroner candidates have medical degrees, or that city engineer candidates have engineering degrees. Although these degrees are third-party designations, they are rationally related to candidates' qualifications for office, and therefore states may require them. As a matter of principle, designation as a full-time employee is no different.

For the reasons above, the district court's decision is AFFIRMED and the request for a permanent injunction is DENIED. The mandate will issue forthwith.

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**No. 2:08-cv-606**

**[Filed October 9, 2008]**

| | |
|---|---|
| ROGER M. ESTILL, et al., Plaintiffs, | ) |
| v. | ) |
| GEORGIANNA COOL, et al., Defendants. | ) |

JUDGE GREGORY L. FROST
Magistrate Judge Terence P. Kemp

## OPINION AND ORDER

This matter came before the Court on October 7, 2008 for a bench trial on Plaintiffs' June 24, 2008 Complaint. Having taken the matter under advisement at the conclusion of that trial, the Court now issues its decision in favor of Defendants and instructs the Clerk to enter judgment accordingly.

## I.

Plaintiffs, Roger Estill and Denise Estill, initiated this declaratory judgment and 42 U.S.C. § 1983 action on June 24, 2008 when they filed a complaint for declaratory and injunctive relief related to Roger Estill's attempt to be placed on the November 4, 2008 ballot as an independent candidate for sheriff of Holmes County, Ohio.[1] (Doc. # 2.) On June 27, 2008, one or more of the plaintiffs[2] then filed a motion for a preliminary injunction variously seeking to prevent "Defendants from enforcing the full time requirement contained in Ohio Rev. Code § 311.01(B)(8)(a) and/or (b)" (Doc. # 3, at 1) or to order "Plaintiff Roger M. Estill's name be placed on the ballot for the November 4, 2008 general election for the office of Sheriff of Holmes County, Ohio" (Doc. # 11, at 11). Consequently, pursuant to S.D. Ohio Civ. R. 65.1(a), the Court held a July 1, 2008 informal preliminary telephone conference with counsel for Plaintiffs and counsel for

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[1] It appeared to this Court that Plaintiffs were electing to abandon a state law claim earlier in this litigation when they requested entry of final judgment against them based on reasoning that did not reach the state law claim. At trial, Plaintiffs then made an oral motion to amended their pleading to delete the state law open meetings claim. Plaintiffs also made an oral motion to amend their Complaint so that they were not asserting claims against Defendants in Defendants' individual capacities. The Court granted both motions to amend.

[2] As the Court previously noted, only one plaintiff, presumptively Roger Estill, actually moved for a preliminary injunction, although the briefing at times included his wife Denise. *Compare* Doc. # 3, at 1 *with* Doc. # 8, at 1 & Doc. # 11, at 5. The Court therefore considered the arguments of both Plaintiffs in addressing the injunctive relief component of this case.

Defendants, which resulted in an agreed-upon briefing schedule and an oral hearing.

Following the hearing, the Court issued a decision denying injunctive relief, concluding that there was no right to a preliminary injunction in large part because there was a failure "to demonstrate a sufficient likelihood of prevailing on the merits to support the requested injunctive relief." (Doc. # 27, at 5.) Plaintiffs appealed that decision (Doc. # 28) and then joined Defendants in asking this Court to stay further proceedings in this case during that appeal (Doc. # 31). Within hours of this Court granting the requested stay (Doc. # 32), which vacated the September 30, 2008 expedited trial date, the Sixth Circuit affirmed the preliminary injunction decision (Doc. # 33). In so doing, the appellate court held that "the public interest in orderly election administration militates in favor of holding that the district court did not abuse its discretion" and that the "attack on [Ohio Rev. Code] § 311.01(B)(8)'s experience requirement does not have a strong likelihood of success." (Doc. # 33, at 3.) Specifically, the Sixth Circuit held:

> [A]s is set out more fully in Judge Frost's well-reasoned opinion, Estill's attack on § 311.01(B)(8)'s experience requirement does not have a strong likelihood of success. Several cases have upheld this and similar requirements, and Estill cites none–and this court is aware of none–that have found such a requirement unconstitutional. *See Cicchino v. Luse,* 2000 U.S. Dist. LEXIS 10314 (S.D. Ohio) (upholding § 311.01(B)(8)'s training and certification requirement for Sheriff candidates); *Aey v. Mahoning County Bd. of*

*Elections,* 2008 U.S. Dist. LEXIS 19247 (N.D. Ohio) (upholding Ohio Rev. Code Ann. § 311.01(B)(9)'s supervisory experience and education requirements for Sheriff candidates); *State ex rel. Watson v. Hamilton County Bd. of Elections,* 88 Ohio St.3d 239 (2000) (same).

*Estill v. Cool*, No. 08-4190, 2008 WL 4411829, at *1 (6th Cir. Sept. 29, 2008); (Doc. # 33, at 3-4 (slip opinion)).

Immediately after receiving the September 29, 2008 appellate decision and its mandate, this Court contacted counsel for Plaintiffs and then counsel for Defendant Brunner by telephone. The Court inquired whether Plaintiffs wished to proceed on the original September 30, 2008 expedited trial date, which the Court offered to reinstate. Instead of proceeding with that trial, Plaintiffs filed a motion and supporting memorandum on the original trial date that asked this Court "to combine the trial on the merits with the hearing on the Motion for Preliminary Injunction and enter Final Judgment adopting the decision on the Motion for preliminary relief as a final order." (Doc. # 34, at 2.) The defendants who comprise the Holmes County Board of Elections did not oppose the motion. Defendant Brunner did oppose the motion, however, and argued that "[b]efore final judgment is issued in this case . . . it is necessary to provide evidence to this Court about how ballot rotation works and how difficult it is for a board of elections to add a name to a ballot after voting has begun" as well as "evidence . . . about the harm that will be suffered by the local board of elections and all voters in Holmes County were either this Court or the Court of Appeals to order

that Roger Estill be placed on the ballot as a candidate for Sheriff." (Doc. # 35, at 1-2.)

Recognizing that Plaintiffs are likely to argue on appeal that they are entitled to injunctive relief ordering that Roger Estill be placed on this November's ballot and that the Ohio Secretary of State was entitled to present evidence and argument against that position, this Court denied the request to enter final judgment and set an expedited trial date of October 7, 2008. (Doc. # 37.) At that trial, the parties expressly agreed to incorporate all of the preliminary injunction proceedings and evidence into the trial proceedings, as well as all prior stipulations. The parties submitted additional stipulations, and the Court entertained additional argument and accepted two Ohio Secretary of State directives as exhibits, Directive 2008-59 and Directive 2008-89.

Defendants presented testimony from one witness, Patricia Wolfe, the elections administrator for the Ohio Secretary of State. Wolfe detailed the pre-election preparation of electronic voting machines, which essentially breaks down into an entry phase in which ballot information is entered into a database, leading to a "proof" phase in which testing is done to ensure accuracy and logic, after which a machine is "locked." Wolfe also explained Holmes County's use of paper ballots if they are requested by a voter or if the electronic voting machines should fail. Her testimony explained that placing a candidate on the ballot at this date would require the creation of a second database, resulting in repeating the steps outlined above.

In addition to the expedited trial proceedings, Plaintiffs and the Holmes County Defendants have stipulated to the following facts:

1. Plaintiff Roger M. Estill is a resident and qualified elector of Holmes County. Ohio, who timely filed a petition seeking placement on the November 4, 2008 general election ballot as an independent candidate for the office of Holmes County Sheriff.

2. Plaintiff Denise A. Estill is a resident and qualified elector of Holmes County, Ohio, who supports the candidacy of Plaintiff Roger Estill for the office of Holmes County Sheriff and intends to vote for Plaintiff Roger Estill for such office at the November 4,2008 general election if his name appears on the ballot.

3. Defendants Georgianna Cool, Lucille L. Hastings, Wesley J. Schmucker, and Ann Stotler are the members of the Holmes County Board of Elections ("Board of Elections"), the duly authorized board of elections of Holmes County, Ohio that, pursuant to Ohio Rev. Code Chapter 3501, is charged with the authority and power to conduct all elections within Holmes County, Ohio.

4. Defendant Jennifer L. Brunner ("Secretary of State") is the Secretary of State of the State of Ohio, who is charged with the authority to direct and advise the county boards of elections with respect to the conduct of all elections in the State of Ohio.

5. On January 28, 2008, Plaintiff Roger Estill filed with Defendant Board of Elections a nominating petition pursuant to Ohio Rev. Code §§ 3513.257 and 3513.261 to be an independent candidate for the office of Holmes County Sheriff at the November 4, 2008 general election.

6. On May 13, 2008, Nathan E. Fritz, the chief deputy for the incumbent Holmes County Sheriff, Timothy W. Zimmerly, filed a protest of Plaintiff Roger Estill's candidacy. In the protest, Mr. Fritz alleged that Plaintiff Roger Estill did not meet the qualifications to run for sheriff under Ohio Rev. Code §311.01(B)(8)(a) or (b).

7. On June 4, 2008, Defendant Board of Elections held a hearing and sustained the protest challenging Plaintiff's qualifications to appear on the November 4, 2008 general election ballot.

8. The incumbent Holmes County Sheriff, Timothy Zimmerly, is the only candidate that Defendant County Board of Elections has certified for the November 4, 2008 general election for the office of county sheriff. Plaintiff Roger Estill and Zimmerly are the only two individuals to file petitions to be candidates in 2008 for the office of Holmes County Sheriff.

(Doc. # 21, at 1-2.) Additionally, Plaintiffs have entered into the following factual stipulations with Defendant Brunner:

1. The board of elections of the appropriate county, not the Secretary of State, determines the

qualifications of each prospective candidate for the office of sheriff.

2. The Secretary of State's office issues advisories to apprise the boards of elections of changes in law that may affect the boards' performance of their duties.

3. The Secretary of State's office issued Advisory 2003-08 to apprise the boards of elections of the enactment of Substitute HB 75 (126th General Assembly), which amended the statute (RC 311.01) governing sheriff qualifications that would affect candidates for that office on and after December 9, 2003.

4. The Secretary of State's office has not issued an advisory about sheriff candidates subsequent to Advisory 2003-08 because the statute governing sheriff candidates has not been amended since December 9[,] 2003.

5. To the extent that a question about whether a sheriff candidate is qualified for the ballot, Secretary Brunner has followed the advisory issued by her predecessor.

6. The advisory leaves up to each county board to determine the meaning of "full time" under RC 311.01(B)(8).

7. The Secretary's elections division has provided no advice to the boards as to whether an

incumbent sheriff candidate is employed full-time by virtue of his office.

(Doc. # 20, at 1-2.)

All of the parties have agreed upon the following stipulated facts:

1. For the November 4, 2008 election cycle, Holmes County has 18, 100 eligible voters.

2. The Holmes County, Ohio Board of Elections (the "Board") currently has 88 voting machines, and these are spread among 19 polling places for use in the November 4, 2008 election, including for use in early, in-person absentee voting. Of these, there are 4 voting machines currently in service for in-person absentee voting.

3. Absentee voting began on September 30, 2008.

4. As of October 7, 2008, the status of programming and testing of voting machines for use for in-person absentee voting is the programming is complete but untested. Absentee voting on a machine will not commence until testing of that machine is complete.

5. As of October 7, 2008, the status of programming and testing of voting machines for use on November 4, 2008 is the programming is complete but untested.

6. Re-programming a voting machine will require the act of programming and testing (including for logic and accuracy). The act of reprogramming is anticipated to take 2 hours total. The testing is anticipated to take $1^{1/2}$ hours per machine. Were the Board to schedule re-programming and testing for each of its voting machines currently in use and planned for use on November 4, 2008, the anticipated completion date of such work is approximately two weeks from when started. The estimated cost for reprogramming the voting machines is $1,056.00.

7. Were the Board to revise the absentee ballots, the anticipated date by which the Board could begin to mail the revised ballots to all electors is one week from start. The estimated cost of revising and resending absentee ballots is $4.750.00.

8. By directive from the Secretary of State, the Board must maintain paper ballots at each polling place. The order for paper ballots for the polls is currently at the printer.

9. Holmes County currently has availability of an on demand system for absentee voting; however, it can only print one ballot at a time or 250 ballots per day.

10. As of 8:00 a.m. on October 7, 2008:

    a. The Board had received 933 requests for absentee ballots; approximately an additional 100 requests arrived at 9:00 a.m.;

b. The Board had mailed 785 absentee ballots to voters and 54 hand carried;

c. Voters cast 94 absentee ballots in person; and,

d. In addition, the Board has received 157 absentee ballots cast.

(Doc. # 41, at 1-2.)

In light of these stipulations and the evidence and arguments presented in connection with the prior briefing , preliminary injunction proceeding, and the trial, the case is now ripe for disposition.

## II.

In addition to imposing various other requirements, Ohio law provides that "no person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless . . . [t]he person . . . has been employed . . . as a full-time peace officer . . . [or] . . . as a full-time law enforcement officer" within and for specified periods of time. Ohio Rev. Code § 311.01(B)(8)(a) and (b). The Ohio General Assembly has not elected to define § 311.01's use of "full time" specifically within the legislative code as it has done elsewhere for other purposes. It is axiomatic that what this means is that the state legislature has left the words to carry their presumptive ordinary meaning. Thus, as this Court previously found, unless for specified purposes–such as perhaps compliance with overtime law–full-time employment is defined by the employer, which is apparently the scheme to which the boards of elections across Ohio have defaulted.

Section 311.01(B)(8) thus imposes a content-neutral qualification requirement that reasonably and minimally limits ballot access to those who, by virtue of satisfying the full-time employment requirement, reflect a basic level of experience or service that is not unlike the experience requirement found in § 311.01(B)(9).[3] This is a reasonably limited and therefore permissible regulation of the ballot. *See Aey*, 2008 WL 554700, at *5 ("The Supreme Court has long recognized that states retain the power to regulate and control their elections through the establishment of ballot-access requirements."). Both statutory provisions ultimately target experience via similar requirement routes. Although (B)(8) arguably imposes a more restrictive (yet still permissible) requirement than (B)(9), both provisions nonetheless allow for means to gain ballot access (especially when crediting Estill's construction of (B)(8) as requiring one day of full-time service or employment, which a prospective candidate could fulfill by obtaining a qualifying position *designated* as full time).

In their Complaint, Plaintiffs assert three basic challenges to the "full-time" requirement. They posit that the requirement of full-time employment is a

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[3] Defendants direct this Court to the fact that, in holding that § 311.01(B)(9) presents a content-neutral experience requirement, the Ohio Supreme Court correctly noted that "[c]andidates for sheriff who do not meet the requirements of R.C. 311.01(B)(9) are not an identifiable, historically protected political group." *State ex rel. Watson v. Hamilton County Bd. of Elections*, 88 Ohio St. 3d 239, 260 (2000). In addition to the undersigned, at least one other federal judicial officer agrees. *See Aey v. Mahoning County Bd. of Elections*, No. 4:08 CV 405, 2008 WL 554700, at *5 (N.D. Ohio Feb. 26, 2008).

limitation that serves to prevent ballot access without furthering a sufficient state interest, that the requirement is unconstitutionally vague, and that the requirement violates equal protection. At trial, Plaintiffs elected to abandon arguing the latter two claims, to which this Court incorporates by reference the analysis of its prior preliminary injunction decision. (Doc. # 27.) Plaintiffs now focus only on whether the full-time requirement satisfies the rational basis test.

A judicial officer in the Northern District of Ohio recently addressed § 311.01 and correctly set forth the inquiry applicable to similar constitutional arguments:

> When reviewing a constitutional challenge to a statute such as R.C. 311.01 that restricts a candidate's ballot access, it is well-settled that the Court applies the following factors: (1) "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," and (2) "the precise interests put forward by the state as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S.Ct. 1564 (1983); *Burdick v. Takushi,* 504 U.S. 428, 434, 112 S.Ct. 2059 (1992); *Cicchino v. Luse,* 2000 U.S. Dist. LEXIS 10314, *13 (S.D. Ohio No. C-2-99-1174) (applying *Anderson Burdick* test to challenge of R.C. 311.01 ).

*Aey*, 2008 WL 554700, at *4. The Sixth Circuit has also explained that a statute that does not implicate a plaintiff's fundamental rights receives rational-basis review, which involves asking whether "the statute at issue is 'rationally related to legitimate government interests.' " *Does v. Munoz*, 507 F.3d 961, 966 (6th Cir. 2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997)). Applying this inquiry, the Court concludes that Plaintiffs cannot prevail.

By imposing a qualification that inherently targets experience here, without mandating such a comparable experience requirement for other candidates for other positions, the Ohio General Assembly has indicated an intent to impose at least a minimal qualification for those who would be sheriff. Full-time employment carries with it an inherent amount of skill, experience, training, knowledge, and/or ability, even if Plaintiffs would question the amounts involved. The Court again concludes that the selective imposition of an experience qualification here is per se evidence of a legislative interest in ensuring that the head county law enforcement officers will meet at least a basic level of qualification or qualifying experience of a specific sort. This is an important and legitimate state interest, even if Plaintiffs would argue that it does not go far enough by permitting those he implicitly characterizes as under-qualified individuals–those who served one day as full time officers–to be candidates.

Recognizing that the interest furthered by the statutory requirement is that a candidate be at least minimally qualified to serve in the position of sheriff is an important point because the statute is required to serve such an interest. It is not necessary that the

statutory scheme be optimum, setting the most ideal qualifications. And it is certainly not necessary that the statutory scheme set a qualification or qualifications that this Court would necessarily impose. What matters is that there is a sufficient fit between this considerable state interest and the statutory requirement. The qualification requirement must be rationally related to the state interest involved.

Continuing to attack the character of this "fit" between the requirement and the qualification it inherently targets, Plaintiffs again assert that the § 311.01 "full-time" requirement is not so much a qualification requirement as a requirement targeting the mode of qualification. Counsel for Plaintiffs in fact expressed disbelief that both this Court and the court of appeals have regarded the full-time requirement as an experience requirement at all. They argue labels are everything in this case because the point is not what a potential candidate's job classification was or is, but whether the statutory requirement at issue serves its asserted governmental purpose. Here, the Ohio General Assembly has set a qualification requirement that, while it could arguably be more stringent to *better* serve its goals, nonetheless indisputably services those goals. It is a standard that sets a minimal qualification to seek the office of sheriff, and the fact that Plaintiffs have at time throughout this litigation posited that it can be construed as not requiring *enough* full-time experience does not invalidate the fact that the statute establishes a qualification, thereby servicing a legitimate state interest.

By arguing for consideration of equivalents–that the hours Roger Estill worked and his years of experience equal the qualification requirement of full-time employment and the experience that inherently targets–Plaintiffs assert that he is of course qualified to be a candidate first and then an elected sheriff. This again raises several points.

The Court notes Plaintiffs' argument that this Court's recognition of the plain language of the statute tracks what they deem a hypertechnical application of the statute. But as this Court stated in its prior decision, a label of "hypertechnical" is often the dismissive refuge of those on the losing side of an argument. The statute requires what it requires, and while Plaintiffs may disagree with the qualification set forth in § 311.01(B)(8) and consider Roger Estill as or more qualified than the experience that statute provision targets, ballot access has never been tied to such subjective beliefs of potential candidates or their supporters. Plaintiffs are free to disagree with a "hypertechnical" application of the statute–i.e., construing the statute to mean what is says and no more or less–but they are not free to disregard it on grounds that because they consider it less effective than it could or should be, it must be unconstitutional.

Plaintiffs' argument also continues to beg the following question: How much experience is enough? Whether the one day of "full-time" service that Plaintiffs contend would suffice to satisfy § 311.01(B)(8)(a) is ideal is not the province of this Court. Rather, this Court is interested in whether the statute presents a permissible qualification scheme. To second guess the requisite qualification as Plaintiffs ask this Court to do would mean that the Court would

substitute its judgment for that of the state's elected legislature. Judges would have to decide what is equivalent experience by evaluating what time served meets the qualification interest. This inquiry would quickly become inane. If Roger Estill is deemed by this Court to be "statutorily" qualified with a laudable 33 years of overall experience–combining 29 years of designated full-time service with differently designated service of more recent vintage, but irregular hours–then does an individual similarly qualify who has six hours less service per recent year? Per month? Per week? And what if that other individual has worked six hours less, but has 34 years of overall experience? Or 38 years of designated part-time experience? What magic combination of years of overall experience and hours worked qualifies an individual to seek office, and how are judges equipped to make such sliding scale evaluations?

The answer of course is that Ohio's legislature has attempted to proscribe a minimal level of acceptable qualification, Defendants have construed the statutory scheme to permit broad ballot access, and this Court should not disturb that scheme. Although the Ohio General Assembly could have mandated a more stringent qualification requirement or provided for substitutions or equivalents, nothing is no requirement demanding such action. All that is required is a rational connection between the aim of the statutory scheme and the requirement imposed, and that fit exists here.

Finally, Plaintiffs' argument that there is no rational basis to distinguish between a qualification of full-time employment versus part-time employment misses the point. The law does not require Ohio's

General Assembly to have a rational basis to impose one requirement while rejecting another or to impose one qualification while rejecting a subjectively equivalent substitute experience. What the law requires is simply rationality for what was imposed. Plaintiffs do not challenge the fact that the state legislature can impose a qualification requirement–they concede that point and the state interest involved here–and they do not even truly continue to attack the nature of the experience qualification imposed here. Rather, Plaintiffs are simply upset that the state has decided not to allow substitutes or equivalents. They *assume* that possessing the skills, training, and experience to obtain full-time employment is the same as those involved in obtaining part-time employment and then complain that the state legislature exercised its discretion to prefer and select experience of one nature over experience of another. But in arguing that there is no rational distinction between full-time and part-time experience when individuals may have worked the same hours in the same day–when much more than mere hours worked may figure into obtaining full versus part-time status–Plaintiffs seek to bootstrap unconstitutionality on mere legislative prerogative. The issue is not the duration of the qualifying experience, or hours worked, as Plaintiffs contend, but the substantive intangibles of skill, experience, and training that enable an individual to obtain a full-time as opposed to part-time position. The employment requirement embodies an experience qualification.

No court should sit as a superlegislature and second guess a state's legislative body when that body has a sufficient basis for its actions, however fine the distinctions at play in those actions may be. Moreover,

as the Sixth Circuit has explained, "[i]t is not difficult for a statute to survive rational basis review. The court is not limited to the defense proffered by [a defendant]; in order to defeat a statute subject to rational basis review, [a plaintiff] must negate 'every conceivable basis' that could support the statute." *Norton Constr. Co. v. U.S. Army Corps of Engineers*, 280 F. App'x 490, 495 (6th Cir. 2008) (quoting *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000)). Plaintiffs have failed to defeat every conceivable basis supporting the legislative action at issue here.

Imposing a requirement of any sort means rejecting other requirements. The wisdom of many such choices will always be open to debate by individuals of equal intellect, but the mere act of choosing is neither irrational nor unconstitutional. Plaintiffs' argument at its core is that the Ohio General Assembly was irrational in not selecting the alternative they support: part-time employment as a qualifier for candidacy. But the limited focus of today's analysis is not on whether there is a rational basis for *not* selecting every potentially unlimited qualification. Rather, the focus is on what the state legislature actually did elect to impose as a qualification and whether there is a rational basis between that election and the statutory goal. The statute must survive judicial scrutiny if it is rationally related to a legitimate state purpose. *See Norton Constr. Co.*, 280 F. App'x at 495. The state has a permissible interest in regulating ballot access and in imposing threshold qualifications for candidacy. Because § 311.01(B)(8) satisfies the applicable test, the Court cannot find any asserted constitutional violation and cannot afford Plaintiffs the relief the seek.

Having reached this conclusion on the substantive merits of Plaintiffs' claims, the Court recognizes that the parties' arguments regarding the appropriate remedy or remedies available if Plaintiffs had succeeded are moot. Because any opinion the Court would offer in this regard would be mere dictum, the Court declines to engage in speculative analysis. The parties have built a factual record on the remedy issues, however, in the event that the court of appeals should change its merits analysis on the second appeal arising from this litigation and elect to reach the remedy arguments.

**III.**

For the foregoing reasons, the Court finds in favor of Defendants. The Clerk shall enter judgment accordingly and terminate this case upon the docket records of the United States District Court for the Southern District of Ohio, Eastern Division.

**IT IS SO ORDERED.**

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

## APPENDIX C

## PAGE'S OHIO REVISED CODE ANNOTATED
## TITLE 3. COUNTIES
## CHAPTER 311. SHERIFF

**ORC Ann. § 311.01.** Qualifications for sheriff; basic training course; continuing education

(A) A sheriff shall be elected quadrennially in each county. A sheriff shall hold office for a term of four years, beginning on the first Monday of January next after the sheriff's election.

(B) Except as otherwise provided in this section, no person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements:

(1) The person is a citizen of the United States.

(2) The person has been a resident of the county in which the person is a candidate for or is appointed to the office of sheriff for at least one year immediately prior to the qualification date.

(3) The person has the qualifications of an elector as specified in section 3503.01 of the Revised Code and has complied with all applicable election laws.

(4) The person has been awarded a high school diploma or a certificate of high school equivalence issued for achievement of specified minimum scores on the general educational development test of the American council on education.

(5) The person has not been convicted of or pleaded guilty to a felony or any offense involving moral turpitude under the laws of this or any other state or the United States, and has not been convicted of or pleaded guilty to an offense that is a misdemeanor of the first degree under the laws of this state or an offense under the laws of any other state or the United States that carries a penalty that is substantially equivalent to the penalty for a misdemeanor of the first degree under the laws of this state.

(6) The person has been fingerprinted and has been the subject of a search of local, state, and national fingerprint files to disclose any criminal record. Such fingerprints shall be taken under the direction of the administrative judge of the court of common pleas who, prior to the applicable qualification date, shall notify the board of elections, board of county commissioners, or county central committee of the proper political party, as applicable, of the judge's findings.

(7) The person has prepared a complete history of the person's places of residence for a period of six years immediately preceding the qualification date and a complete history of the person's places of employment for a period of six years immediately preceding the qualification date, indicating the name and address of each employer and the period of time

employed by that employer. The residence and employment histories shall be filed with the administrative judge of the court of common pleas of the county, who shall forward them with the findings under division (B)(6) of this section to the appropriate board of elections, board of county commissioners, or county central committee of the proper political party prior to the applicable qualification date.

(8) The person meets at least one of the following conditions:

(a) Has obtained or held, within the four-year period ending immediately prior to the qualification date, a valid basic peace officer certificate of training issued by the Ohio peace officer training commission or has been issued a certificate of training pursuant to section 5503.05 of the Revised Code, and, within the four-year period ending immediately prior to the qualification date, has been employed as an appointee pursuant to section 5503.01 of the Revised Code or as a full-time peace officer as defined in section 109.71 of the Revised Code performing duties related to the enforcement of statutes, ordinances, or codes;

(b) Has obtained or held, within the three-year period ending immediately prior to the qualification date, a valid basic peace officer certificate of training issued by the Ohio peace officer training commission and has been employed for at least the last three years prior to the qualification date as a full-time law enforcement officer, as defined in division (A)(11) of section 2901.01 of the Revised Code, performing duties related to the enforcement of statutes, ordinances, or codes.

(9) The person meets at least one of the following conditions:

(a) Has at least two years of supervisory experience as a peace officer at the rank of corporal or above, or has been appointed pursuant to section 5503.01 of the Revised Code and served at the rank of sergeant or above, in the five-year period ending immediately prior to the qualification date;

(b) Has completed satisfactorily at least two years of post-secondary education or the equivalent in semester or quarter hours in a college or university authorized to confer degrees by the Ohio board of regents or the comparable agency of another state in which the college or university is located or in a school that holds a certificate of registration issued by the state board of career colleges and schools under Chapter 3332. of the Revised Code.

(C) Persons who meet the requirements of division (B) of this section, except the requirement of division (B)(2) of this section, may take all actions otherwise necessary to comply with division (B) of this section. If, on the applicable qualification date, no person has met all the requirements of division (B) of this section, then persons who have complied with and meet the requirements of division (B) of this section, except the requirement of division (B)(2) of this section, shall be considered qualified candidates under division (B) of this section.

(D) Newly elected sheriffs shall attend a basic training course conducted by the Ohio peace officer training commission pursuant to division (A) of section 109.80 of the Revised Code. A newly elected sheriff

shall complete not less than two weeks of this course before the first Monday in January next after the sheriff's election. While attending the basic training course, a newly elected sheriff may, with the approval of the board of county commissioners, receive compensation, paid for from funds established by the sheriff's county for this purpose, in the same manner and amounts as if carrying out the powers and duties of the office of sheriff.

Appointed sheriffs shall attend the first basic training course conducted by the Ohio peace officer training commission pursuant to division (A) of section 109.80 of the Revised Code within six months following the date of appointment or election to the office of sheriff. While attending the basic training course, appointed sheriffs shall receive regular compensation in the same manner and amounts as if carrying out their regular powers and duties.

Five days of instruction at the basic training course shall be considered equal to one week of work. The costs of conducting the basic training course and the costs of meals, lodging, and travel of appointed and newly elected sheriffs attending the course shall be paid from state funds appropriated to the commission for this purpose.

(E) In each calendar year, each sheriff shall attend and successfully complete at least sixteen hours of continuing education approved under division (B) of section 109.80 of the Revised Code. A sheriff who receives a waiver of the continuing education requirement from the commission under division (C) of section 109.80 of the Revised Code because of medical disability or for other good cause shall complete the

requirement at the earliest time after the disability or cause terminates.

(F) (1) Each person who is a candidate for election to or who is under consideration for appointment to the office of sheriff shall swear before the administrative judge of the court of common pleas as to the truth of any information the person provides to verify the person's qualifications for the office. A person who violates this requirement is guilty of falsification under section 2921.13 of the Revised Code.

(2) Each board of elections shall certify whether or not a candidate for the office of sheriff who has filed a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate meets the qualifications specified in divisions (B) and (C) of this section.

(G) The office of a sheriff who is required to comply with division (D) or (E) of this section and who fails to successfully complete the courses pursuant to those divisions is hereby deemed to be vacant.

(H) As used in this section:

(1) "Qualification date" means the last day on which a candidate for the office of sheriff can file a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate, as applicable, in the case of a primary election for the office of sheriff; the last day on which a person may be appointed to fill a vacancy in a party nomination for the office of sheriff under Chapter 3513. of the Revised Code, in the case of a vacancy in the office of sheriff; or a date thirty days after the day on which a vacancy in

the office of sheriff occurs, in the case of an appointment to such a vacancy under section 305.02 of the Revised Code.

(2) "Newly elected sheriff" means a person who did not hold the office of sheriff of a county on the date the person was elected sheriff of that county.